IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *R. v. S.B.*, 2016 NLCA 20
Date: May 11, 2016
Docket: 201401H0056

Section 486.4 of the *Criminal Code* respecting the non-publication of the identity of a complainant or of a witness and any information from which they might be identified applies to this judgment.

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

S.B. — RESPONDENT

Coram: Green C.J.N.L., Rowe and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G4957

Appeal Heard: December 10, 2015
Judgment Rendered: May 11, 2016

Reasons for Judgment by Rowe J.A.
Concurred in by White J.A.
Dissenting Reasons by Green C.J.N.L.

Counsel for the Appellant: Iain R. W. Hollett
Counsel for the Respondent: Rosellen Sullivan

Rowe J.A.:

FACTS

[1] The respondent, S.B., was charged with 10 offences alleged to have occurred between March 1, 2005 and May 26, 2012:

i. careless handling of a firearm contrary to s. 88(1) of the *Criminal Code*;

ii. five counts of assaulting C.M. (the complainant) contrary to s. 266 of the *Criminal Code*;

iii. two counts of sexual assault against C.M. contrary to s. 271 of the *Criminal Code*;

iv. assaulting C.M. with a weapon, a knife, contrary to s. 267(a) of the *Criminal Code*; and

v. assaulting K.S. contrary to s. 266 of the *Criminal Code*.

[2] At the time of the alleged offences, the accused and the complainant were in a relationship which progressed from dating to engagement to marriage. K.S. is the complainant's daughter from a previous marriage.

[3] Before the trial, the accused applied pursuant to s. 276 of the *Criminal Code* to cross-examine the complainant on her prior sexual activity. The accused wished to cross-examine the complainant on: (1) anal sex with the accused, referring to a video of the two; (2) an affair by the complainant during the marriage, referring to text messages between the complainant and her paramour; and (3) other sexual activity.

[4] The trial judge allowed the accused's s. 276 application in part. He held that the text messages concerning the affair could be used during cross-examination. He also held that the transcript of the sex video with the accused could be used.

[5] The trial was before a judge and jury.

[6] The complainant described the alleged assaults and sexual assaults. The accused denied the assaults occurred and said that sexual intercourse had been with the complainant's consent.

[7] The jury acquitted the accused of all charges. The Crown appeals the acquittal and seeks a new trial, based on errors of law by the trial judge regarding evidence.

ISSUES

[8] The Crown set out the issues differently, but they can be grouped under three headings:

(1) Did the trial judge err as regards the cross-examination of the complainant concerning text messages relating to the affair and concerning the sex video with the accused?

(2) Did the trial judge err in refusing to permit the Crown to lead evidence to rebut the allegation of recent fabrication that arose during the complainant's cross-examination?

(3) If the judge erred regarding (1) and/or (2), should a new trial be ordered?

ANALYSIS

Collateral Fact Rule and s. 276 of the Criminal Code

[9] In his decision to allow cross-examination of the complainant by reference to the text messages relating to the affair and the sex video with the accused (*R. v. S.B.*, 2014 NLTD(G) 61), the trial judge wrote at para. 24:

> The Crown submits that the proffered categories of evidence by the Defendant are inadmissible because they are directed solely at contradicting the complainant in respect of facts collateral to the issues at trial. Collateral evidence may be admitted to contradict a witness to impugn her credibility (*R. v. Toms,* [2001] N.J. No. 348, 205 Nfld. & P.E.I.R. 352, (S.C.(T.D.)) at para. 17).
>
> (Emphasis added.)

[10] The trial judge rejected the Crown's submission that collateral fact evidence is inadmissible; to the contrary, the trial judge asserted that such evidence is admissible to impugn credibility. But that is not what the collateral fact rule has traditionally said.

[11] In *The Law of Evidence in Canada: Sopinka, Lederman and Bryant*, (3d ed.) at pp. 1170-71, the authors describe the collateral fact rule:

> There is a general rule that answers given by a witness to questions put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. Without such a rule, there is the danger that litigation will otherwise be prolonged and become sidetracked and involved in numerous subsidiary issues. The rule does permit the use of extrinsic evidence to contradict a witness who has made a statement in cross-examination which is relevant to the substantive issue. However, with respect to questions which are directed solely to impeaching a witness' credibility, the answers must, save for certain common law and statutory exceptions, be accepted as final. McIntyre J., in Krause v. R., [1986 2 S.C.R. 466, 29 C.C.C. (3d) 385 at 391-92 C.C.C.] described collateral matters as being "non determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case."

I adopt the foregoing, which I will refer to as the Sopinka approach. See also *R. v. M.(G.)*, 2012 NLCA 47, para. 51.

[12] I note the references in the foregoing quote to "substantive issue" and "an issue arising in the pleadings or indictment". In the criminal context, this means relevant to an element of the offence, e.g. identity. It does not refer to credibility, which in many cases must be assessed in deciding a "substantive issue" or "an issue arising in … the indictment". Credibility is not a "substantive issue", nor is it "an issue arising in … the indictment".

[13] The Sopinka approach to the collateral fact rule has been applied in many cases. One example is the Ontario Court of Appeal decision in *R. v. A.R.B.* (1998), 41 O.R. (3d) 361, aff'd [2000] 1 S.C.R. 781 at para. 13:

> [T]he general rule is that one cannot impugn a witness's credibility by contradicting the witness on matters which are collateral even in a case where the "core" issue is credibility. As stated in *Phipson, supra,* at para. 12-33:
>
> > A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters, and his answers thereon will be conclusive. This rule is not absolute. The test whether a matter is collateral or not is this: "if the answer of a witness is a matter which you would be allowed on your own to prove in evidence -- if it had such a connection with the issues, that you would be allowed to give it in evidence -- then it is a matter on which you may contradict him".

[14] One often hears the phrase "credibility is always in issue" or "credibility is always relevant" as the rationale for seeking to contradict a witness on a collateral fact. This use of words confuses what is at issue (i.e. did the accused commit the offence as charged) and what is relevant to that (e.g. has identity been proven) with the process of assessing credibility which is "in issue" only in the sense that it is the subject of controversy.

[15] Put another way, if "credibility is always in issue" or "credibility is always relevant", then the collateral fact rule would be rendered meaningless as any factual basis for an attack on credibility would become "relevant" and, thereby, would not be "collateral".

[16] Viewed properly, the collateral fact rule is a particular application of the general rule that evidence should be relevant. By definition, what is collateral is not relevant and what is relevant is not collateral.

[17] McIntrye J. in *R. v. Krause* (1986), 54 C.R. (3d) 294 (SCC) wrote that a matter is collateral "where it is not determinative of an issue in the pleadings or indictment or not relevant to matters that must be proved for the determination of the case, [and] no rebuttal will be followed." This reflects what I have referred to as the Sopinka approach. See also the discussion of what is collateral in *R. v. Ryan*, 2011 NLCA 53, para. 41.

[18] In some academic writing and in some jurisprudence, leading evidence on a collateral fact is permitted. Proponents of this view include Professors Paciocco and Steuseer. Their view was set out in a decision of this Court, *R. v. G.M.*, *infra*.

[19] In *R. v. G.M.*, 2012 NLCA 47, this Court commented on the collateral fact rule:

> [51] A helpful discussion of the purpose of the collateral facts rule and its effect is found in *R. v. Boyd*, 2006 MBQB 128, [2006] 11 W.W.R. 721. Duval J. wrote:
>
> > [22] Crown counsel relied on *Watt's Manual of Criminal Evidence* (Toronto: Carswell, Thomson Canada Limited, 2002), which states at [paragraph] 22.03, p. 265:
> >
> > > The collateral facts rule prohibits the introduction of evidence for the *sole* purpose of *contradicting* a witness' testimony concerning a collateral fact. The rule seeks to avoid confusion and proliferation of issues, wasting of time and introduction of

> evidence of negligible assistance to the trier of fact in determining the real issues of the case. It endeavours to ensure that the sideshow does not take over the circus. In general, matters that relate wholly and *exclusively* to the credibility of a non-accused witness are collateral, hence beyond the reach of contradictory evidence.
>
> (Italics in original, underlining added.)

[52] Duval J. also referred to a paper on the collateral facts rule prepared by Scott C.J.M. in 2000 for presentation at a seminar:

> [30] … In his paper, Chief Justice Scott concludes that the overriding considerations in the application of the collateral facts rule are whether the evidence in question can make a sufficient contribution to the determination of the case without prejudicing the accused, extending the court's resources, or confusing the issues.

[53] In *Boyd*, Duval J. found that the challenged evidence, which related to a witness' credibility was, nonetheless, admissible:

> [31] I have concluded that the evidence relating to the February 6, 2003 incident is a collateral fact which is only relevant to the assessment of the credibility of Constable Tremblay. It is relevant to the determination of whether his evidence, respecting the incident of February 5, 2003 on which the charge of assault is based, is reliable or in part fabricated or exaggerated, or based on bias, as alleged by the defence. Is the evidence sufficiently relevant? In my opinion it is. Constable Tremblay's credibility goes to the essence of the Crown's allegation of assault. Further, the Crown was not prejudiced by the calling of the "collateral fact" evidence as it was given an opportunity to prepare and to call witnesses relevant to the issue raised by the defence.
>
> [32] Paciocco and Steusser [*Essentials of Canadian Law: The Law of Evidence*, 2nd edition (Toronto: Irwin Law, 1999)] have suggested the following test in determining whether to admit "collateral evidence": Is the evidence offered of sufficient value and of sufficient importance to the issues before the court that it ought to be heard having regard to the necessary court time required, potential confusion of issues, and any unfairness and prejudice to the witness? Applying that test, I have concluded that the evidence led on the *voir dire* is of such sufficient value and importance to the issues for determination before this court. Any potential unfairness or prejudice to the officer has been addressed by the opportunity to lead evidence during the *voir dire* hearing. …

[20] I would note three things concerning the foregoing. First, it was a commentary in passing, as the application of the collateral fact rule was not at issue in the case. Second, the commentary does not refer to the existence of a separate body of jurisprudence, e.g. the Supreme Court of Canada's decision in *R. v. Krause, supra*, that outlines a fundamentally different view. Third, the decision was reversed by the Supreme Court of Canada (*R. v. G.M.*, 2013 SCC 24), albeit on other grounds. Thus, this Court did not provide a settled view of the collateral fact rule in *R. v. G.M.*

[21] A view of the collateral fact rule more in line with the Sopinka approach was set out by this Court in *R. v. J.H.*, 2014 NLCA 25 at para. 33-37. See also *R. v. Ryan*, 2011 NLCA 33 at para. 34-41.

[22] I would note that the trial judge (at para. 25 of *R. v. S.B.*, 2014 NLTD(G) 61) relied entirely on para. 53 of *R. v. G.M.* as the basis for his statement of the collateral fact rule. If the law is other than that stated by Duval J. in *R. v. Boyd*, 2006 MBQB 128, then the trial judge erred in law.

[23] I am critical of the Paciocco and Steusser approach for several reasons. The approach is difficult for a judge to administer; as well, it is almost impossible for counsel to predict whether evidence on a collateral fact will or will not be admitted. Also, by its nature it deflects the trial away from whether the accused committed the offence as charged into a potentially far ranging and extensive series of inquiries into the background of witnesses, notably complainants. Inevitably, the approach will have a discouraging effect on the reporting of crime by persons who have a checkered past; such victims will fear that defence counsel will hang out all the dirty laundry of their past in a general assault on their character. To some degree, these general concerns are met in the context of sexual offences by the operation of s. 276 of the *Criminal Code*.

[24] Subsection 276(2) reads:

> In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
>
> (*a*) is of specific instances of sexual activity;

> (*b*) is relevant to an issue at trial; and
>
> (*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> (Emphasis added.)

[25] Thus, no evidence of "sexual activity other than the sexual activity that forms the subject matter of the charge" is admissible unless the evidence meets three criteria:

(a) it is of specific instances of sexual activity;

(b) it is "relevant to an issue at trial", and

(c) it "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice".

[26] It is critical to have regard to (b) "relevant to an issue at trial". What is relevant to an issue at trial is not collateral to an issue at trial. Section 276 deals with whether or not evidence that is "relevant to an issue at trial" and, thereby, ordinarily would be admissible should nonetheless be screened out. (Collateral matters should already have been screened out by the collateral fact rule.) Thus, s. 276(2)(b) makes clear that the test of probative value and prejudice to the proper administration of justice is a screen to be applied to evidence that is "relevant" (and, therefore, not collateral). See *R. v. J.H.*, *supra*, para. 37 regarding s. 276(2)(b).

[27] It is a fundamental error to view s. 276 as a means to do an "end run" around the collateral fact rule; it is misuse of s. 276 to utilize it to put before a jury evidence of prior sexual activity that would not be admissible under the common law rules of evidence, including the collateral fact rule.

[28] The trial judge stated the collateral fact rule and interpreted s. 276 in a way quite different from the foregoing. He wrote in paragraph 26:

> The following, therefore, is the test for admissibility of evidence relating to a collateral fact: is the evidence offered of sufficient value and of sufficient importance to the issues before the Court that it ought to be heard having regard to the necessary Court time required, potential confusion of issues, and any unfairness and prejudice to the witness? In this trial for sexual assault, where the evidence relates to sexual activity of the complainant other than the circumstances of the charge itself, this question is subsumed into the mandated analysis under

> section 276. That is, in the circumstances of this case, section 276 can be seen to be a specific application of the collateral evidence rule where evidence is sought to be adduced at trial that the complainant has engaged in collateral sexual activity with the Defendant or another person. Consequently, I am satisfied that the collateral evidence rule, in and of itself, is not an impediment to the evidence being adduced for the purpose of challenging the complainant's credibility.

[29] I would note that, by virtue of s. 276.5, on appeal the judge's determination of admissibility of evidence pursuant to s. 276(2) "shall be deemed to be a question of law". Accordingly, the standard of review is correctness.

[30] There are several errors in para. 26 of the judge's decision. First, there is ample authority that the collateral fact rule is not "subsumed into the mandated analysis under s. 276." In *R. v. A.R.B.* (1998), 41 O.R. (3d) 361, 128 C.C.C. (3d) 457, aff'd 2000 SCC 30, [2000] 1 S.C.R. 781, the Ontario Court of Appeal stated at para. 10:

> Accordingly, we must look at the entire process that the defence wished to introduce into this trial to determine if it is collateral to the issues before the jury. In my opinion it is. The fact that others had sexually assaulted the complainant is irrelevant to the charges against the appellant and to any defence he might have to the charges. It is an attempt to pit the complainant against her whole family and others instead of simply against her father. It is inimical to the spirit of the principle underlying s. 276 of the Criminal Code prohibiting evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge against the appellant. While s. 276 contemplates sexual activities by a consenting adult complainant, I am offended at the prospect of this complainant having her entire pre-adult sex life exposed to public scrutiny on the excuse of testing her credibility: the same excuse that formally excused this type of inquiry of adult complainants. However, resort to s. 276 is not necessary. I think that this is the ultimate collateral issue and is excluded by the common law rules of evidence.
>
> (Emphasis added.)

The same point was made by this Court in *R. v. J.H.* 2014 NLCA 25 at para. 37:

> [W]e find it is not necessary to resort to [s. 276] in this case because the proposed … evidence is collateral and inadmissible in any event.

[31] Second, the foregoing passage is premised on the idea that collateral fact evidence is admissible, whereas ordinarily it is not.

[32] Third, the foregoing passage states that s. 276 is "a specific application of the collateral evidence rule", whereas the two are distinct. The collateral fact rule deals (not surprisingly) with evidence that is collateral; s. 276 deals with evidence that is relevant (and, therefore, ordinarily would be admissible), but which, nonetheless, is to be excluded unless its probative value outweighs "the danger of prejudice to the proper administration of justice".

[33] Fourth, the foregoing passage states "the test for admissibility of evidence relating to a collateral fact: is the evidence offered of sufficient value and of significant importance to the issues before the Court that it ought to be heard having regard to the necessary court time required, potential confusion of issues, and any unfairness and fairness to the witness … [t]his question is subsumed into the mandated analysis under section 276". However, as noted above, the test in s. 276(2)(c) is not whether to allow evidence of collateral facts to be admitted, but rather whether to render inadmissible evidence that is relevant and, thus, otherwise would be admissible. In addition, the two tests say different things; the trial judge's formulation focuses on keeping the "trial within a trial" within practical boundaries, whereas the s. 276(c) test speaks to broader considerations in "the proper administration of justice".

[34] Those broader considerations are outlined in s. 276(3), which reads:

> In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (*a*) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (*b*) society's interest in encouraging the reporting of sexual assault offences;
>
> (*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (*d*) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

> (*f*) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (*h*) any other factor that the judge, provincial court judge or justice considers relevant.

[35] In summary, the tests relate to different kinds of evidence and differ in their content. To say (as did the trial judge) that one is "subsumed" in the other confuses matters.

Text Messages and the Affair

[36] The complainant had an affair while married to the accused. In itself, this would be irrelevant to the charges. However, the complainant in her statements to police volunteered that she had been faithful.

[37] Considerable leeway is given during cross-examination, including putting questions to a complainant on collateral matters (which the affair clearly was) in order to test credibility.

[38] I would reproduce a portion of the cross-examination of the complainant in which the statement by the complainant that she had been faithful was put to her and she admitted that she had been unfaithful and, thus, untruthful.

> Q. [C.M.], as I have reviewed with you already, you gave, actually, probably six statements, but five the Crown has spoken of, five statements to the R.C.M.P., correct? A. Correct.
>
> Q. You'll have to speak up a little bit but the first statement you gave, which was on the 26th of May 2012, was what is called a KGB statement, do you understand that? You were aware of what a KGB statement was, were you not? A. I'm sure it was explained to me but I don't recall what that –
>
> Q. The KGB statement was one where you swore under oath. A. Yes.
>
> Q. So, while it's not in a courtroom and it's not before a jury or a judge, it is a statement that you take an oath to tell the truth the whole truth and nothing but the truth so help you God? A. Correct.
>
> Q. Right? A. Correct.

Q. And that KGB statement was a number of hours, a number of pages for sure? A. Correct.

Q. And you were, obviously, aware that you were under oath and had to tell the absolute and complete truth at that time? A. Yes.

Q. There was no doubt in your mind as to what it meant by swearing of the statement? A. Absolutely not.

Q. Taking the oath on the bible or - A. Correct.

Q. Or solemn affirmation, correct? A. Correct.

Q. Okay? On page 20 of that statement, a very long paragraph,

"Ahmmh, when I got home, he was te-te-te, was he at the airport that time, that night because there was a time that he was there and there was a time he wasn't. October, he wasn't",

Etcetera, etcetera, etcetera.

"I went out and I said I did nothing wrong. I was with my colleagues, ahm, you know, we did, I didn't even drink, some of 'em were drinking. I didn't, I think I might've had a glass of, maybe two, I think, no actually, I had a glass of wine and a beer if it makes a difference. Ahm, anyway, ahm he's so friggin'vulgar at the time, like you can't go anywhere, you can't do anything or there's somebody, you know, come back to the hotel room with you or, and I'm just like, everybody's not like that and I have never give [S.B.] any reason to ever, I've never cheated on him and eh..eh…you know, I've nev… I know he's insecure even though he is like come back that he's really a secure person; he's a very insecure and ahm I've never give him any reason and I don't try to make him feel that way because I know he's in…an insecure person."

Do you remember saying that to the police? A. I know I said it, its in my statement, do I actually recall every word that I said that night, that was my first statement?

Q. It was the KGB statement? A. Yes.

Q. That was sworn, under oath? A. Yes.

Q. Where you knew you had to tell the truth. A. That's right, I understand what that means.

Q. And is that what I've just shown you there, ma'am? A. Yes, sir.

Q. And that was on page 20,

> "I've never cheated on him".

And then, on page 21, you make a number of statements but then you say,

> "We went out and we had supper, we ahm went downstairs in a hotel, and had ahm well, I had a glass of wine because I don't drink and he was calling me, texting me for about a while, I'm not sure how may times he called, but anyway, he text me and I didn't reply to his message ASAP, so he threatened divorce and everything else; anyway, I was, replied to his message ahm two o'clock in the morning, but, apparently that was like two-thirty here or whatever, it was. Anyway, he's he's never got over that, he says that I was out well his words is you're out whoring around. You were out drinking and I don't know who the hell you were sleeping with and that's not me and he knows that but that's just his hurt words."

Did you also say that, [C.M.]? A. Yes, sir

Q. Thank you. Now, I have to correct on one thing, the first statement, or this statement that I just read to you, that was the KGB statement,

> "Anyway, he, he's never got over that, he says that I was out well his words is you're out whoring around. You were out drinking and I don't know who the hell you were sleeping with and that's not me and he knows that but that's just his hurt words."

That was what you said in the KGB statement. A. Okay.

Q. Yes? A. Yes.

Q. I want you to be sure because you note the notation at the top, KGB, warned statement of [C.M.] 12:05:26 page 21? A. Yeah.

Q. And this was after you had been away on business in Halifax, was it? A. Yes, correct.

Q. And then on the next statement, that was one statement, the next statement, the 28th where you made the statement, (as read)

> "And I've never given [S.B.] any reason, ever, I've never cheated on him",

> Okay, so that's three days later, but it wasn't the KGB like the first one, but in both of those you maintain you never cheated on him. A. Mmm mph.
>
> Q. Have you cheated on him? A. Yes, I have.
>
> Q. Okay. A. One time.
>
> Q. One time. A. One person, I should say.

[39] Later in cross-examination, defence counsel returned to the fact that the complainant had been untruthful in her statements to police.

> Q. And it was in May 26th and 28th, 2012, once in the KGB statement, and once in a subsequent statement, the first one under oath that you told the police you had never cheated on your husband? A. I did.
>
> Q. You did, so you lied in the KGB statement, correct? A. Yes, I did.
>
> Q. Yes, you did. And, in fact, when you are carrying on this affair, you were still communicating with your husband and you were pretending that everything was fine? A. Of course I was.

[40] Later in the cross-examination, defence counsel again returned to the fact that the complainant had been untruthful in her statements to police.

> Q. So why did you lie to the police in the statements? A. Why did I lie? Sir, my honest answer to that would be –
>
> Q. That would be nice, your honest answer. A. Yeah.
>
> Q. Why did you lie after, excuse the expression, "the shit has hit the fan", you're at the police giving a statement. You're giving the second statement on the 28th. Your oath. Why would you lie about things that happened two months before when you're giving this statement, under oath, to the police, that you never cheated on him.
>
> Q. Why wouldn't you just say, "Yeah I cheated on him." A. Because at the time I was quite upset, nervous, scared, of what was actually happening by me testifying. I was nervous that – I didn't really know how everything was going to play out. I was always told that I was not going to be believed by the police if I told anything. I was afraid that we weren't going to get to the point that we are right now where a charge is laid. If I am to be honest, this is what I'm telling you.

Q. [C.M.]. Go ahead and finish. A. [C.M.], please. And everything was just – I was scared. I was afraid, can I finish, please?

Q. Yes. A. I was afraid that he was going to find out somehow when I was giving statements, I was giving statements in Gander and I was scared, that's my honest answer. I know I lied and I apologize for lying but I was really scared. I'm sorry.

Q. [C.M], I've all ready showed that you lied about your resume after you were finished with him, okay, outright lie number one? A. Yeah.

Q. Number two, you are giving a statement under oath, you take a bible like that and you swear on it, that's a KGB statement and I have no doubt and if you say you didn't understand it I'm going to call the cop who took it. A. I didn't say that.

Q. Okay, so if you understood it, you knew it was under oath, yet you lied on it? You waited another two days, gave another statement, you lied on it again, correct? A. Correct.

Q. You were scared yet you volunteered this. They didn't, specifically ask, "were you cheating on your husband. Were you having an affair behind his back?" You, in both of those statements, and I'll give you the pages again if you want. A. Mmm mph.

Q. Both those statements, volunteered that you weren't cheating on him, it's not something you would ever do (as read)

> "I don't know who the hell you're sleeping with and that's not me and he knows that but he just, that's just his hurt words. I never gave [S.B.] any reason to ever, I never gave [S.B.] any reason to ever. I never cheated on him. Ahm, you know, I never, I know he's insecure even though he likes to come back and he's really a secure person, he's very insecure."

This was volunteered. This was information you were giving. It wasn't even asked and you're outright lying to them. Why? Well, there's nothing to be scared of there. Two separate statements, you're in a police headquarters? A. Oh, yes, there is still things to be scared of. Absolutely, there is.

Q. Okay. A. And a lot of the statement, as you can see, if you were reading down through everything, which I'm sure you did, was a lot of rambling. You could tell I was very nervous giving those statements.

> Q. No, no, no, no, no, no, no, no [C.M.], we're not going to go that there was rambling, yes, there may have been rambling but you clearly made these statements. A. I did.
>
> Q. "I never cheated on him. That's not me." Two days apart. Two separate statements. One under oath. The same as you are now. A. I am very well aware.

[41] The Crown makes no objection to the foregoing questioning. What the Crown objects to is that defence counsel read aloud a series of text messages sent to and from the complainant (followed from time to time by a question to the complainant whether the messages were hers, which she acknowledged). Some of her texts read by defence counsel were:

> Oh my u have me like so horney, now, just layid here in bed thinking about you and how good I'm going to suck ur cock on the way back to the hotel. Fuck. I'm going to swallow your cum and when I get back to our hotel I want you to undress me and fuck me really hard. It will be a couple of nights you will remember. Remember for a while.
>
> Good morning, sexy man, hope you slept well, have safe flight back, see you on Sunday. So looking forward to it. I'll text when I leave.
>
> Your name was just mentioned here at the office Amanda was teasing me saying that I told Fraser that u were hot Got me thinking yeah, that was some awesome sex. I was really looking forward to taking advantage of your tanned up body next week. Damn that s disappointing However I will have to be patient. Good things are worth waiting for cannot help but to fantasize about that tanned up body though,
>
> Hoping I could come up with a good enough reason to get u back here, lol Oh the things I would like to do to you and that hot body I would pleasure u.
>
> I wish Ohhhhhh Baby I think we both rock each others world right about now.
>
> Not fair you should be here helping me. The girls have been gone most of the day I can only imagine what I would do to u in one of these service rooms if I was alone with you now Anything you would want me too When I think about you I get so horny I would really love to fuck you I obviously enjoy our sex and yes I will call him now
>
> You really make me crazy and make me lust for you,
>
> Big strong sexy gorgeous man u are an instant orgasm for me.

> Ha ha ha if you could join me I would show you how I d organsm Shower or not You started this morning talking dirty to me Talking about cuming ins 8 ide of me Omg the things I could do to you right now,

[42] In the following passage, Crown counsel questioned the relevance of the text messages; the judge replied:

> MR. SUMMERS [Crown counsel]: I question, what is the relevance?
>
> THE COURT: Okay, I don't think Mr. Simmonds [defence counsel] has to respond. The relevance is obvious that she gave statements to the police in which [C.M.] said she had not cheated on [S.B.] or that he thought she was cheating and "that's not me and he knows it", and these are evidence that Mr. Simmonds is going to suggest prove to the contrary and he is asking questions each time after I suggested that he do it on the one time he missed that she adopt these as her statements and if these statements are inconsistent with her other statements he's allowed to make something of that. So, carry on, Mr. Simmonds.

The foregoing exchange occurred in the presence of the jury.

[43] If the complainant had denied having the affair and said that she had been truthful in her statements to police, one can see the rationale for defence counsel putting to the complainant, "Don't these messages show that you were having an affair and, therefore, you lied in your statements to the police?" But when the complainant readily admitted the affair and the untruthfulness in her statements to police, what purpose did reading out the text messages serve? It was not to show that she had an affair; she admitted that. It was not to show that she had lied in her statements to police; she admitted that, too. Both are legitimate in the truth-seeking function of a trial. What is not legitimate is the gratuitous humiliation and denigration of a complainant, which was what occurred when C.M.'s text messages were read aloud to the jury by defence counsel.

[44] With respect, I must fundamentally disagree with the trial judge. In the circumstances of this case … where the unfaithfulness and, thus, the untruthfulness in her statements to police were admitted … reading out the texts had the effect of conjuring up the first of the twin myths which s. 276 is intended to prevent, that because of her prior sexual activity (here, her unfaithfulness) the complainant is more likely to have consented to sexual intercourse with the accused on the occasions as charged, being a woman (to use an old phrase) of "easy virtue".

[45] Under s. 276(3)(a) the trial judge in deciding the admissibility of evidence of prior sexual activity is required to consider "the right of the accused to make a full answer and defence." In my view, full answer and defence ended with the complainant's admissions that she had an affair and that she was untruthful in her statements to police concerning this. Reading out the text messages went beyond this and ran counter to the considerations set out in s. 276(3)(b), (c), (d), (e) and (f), none of which the trial judge seems to have taken into account.

The Sex Video

[46] The accused and the complainant made a sex video of themselves. This involved the complainant dressing up as a "French maid", referring to herself as the accused's "slutty wife" and (apparently) eagerly engaging in anal intercourse. The fact that such a video was made or what occurred in it was irrelevant to the charges against the accused.

[47] Defence counsel sought to use the video to impeach the credibility of the complainant on the basis that in statements to police she had indicated that anal intercourse was not her preference, but she had engaged in it with the accused because he wished her to. Specifically, she said the following in statements to police:

> Question by police officer:
>
> So, I know, I know you're saying like he would never rape you or anything like, I'm still not really sure, like, a lot of things, like, you kinda saying about your sexual arrangement still makes me wonder if you guys did things that you didn't really want to do.
>
> Reply by complainant:
>
> No, like anal sex was the favorite thing for him. It's not really that it was something that I would go after him for. I wouldn't say, well, can we have anal sex, I would never say that but I knew like it was something that he really enjoyed and so I went along with it sometimes, well, most of the time because,
>
> Subsequent statement to the police:
>
> It's happening and that, that's it and he kept it up and kept it up and he knew I was against having anal sex, especially when mmm, he was just watching it, you know, on porn and then he just kept it up and kept it up, like, he did it to be playful and we ended up having anal sex afterwards.

[48] In considering whether to permit defence counsel to have reference to the sex video to cross-examine the complainant on her statements to police, the trial judge relied on the following passages from the Supreme Court of Canada in *R. v. Darrach*, 2000 SCC 46:

> 36 This Court has already had occasion to admit evidence of prior sexual activity under the current version of s. 276. In [*R. v. Crosby*, [1995] 2 S.C.R. 912], such evidence was admissible because it was inextricably linked to a prior inconsistent statement that was relevant to the complainant's credibility (at para. 14) …
>
> 38. If evidence is not barred by s. 276(1) because it is tendered to support a permitted inference, the judge must still weigh its probative value against its prejudicial effect to determine its admissibility …
>
> 43 When the trial judge determines the admissibility of evidence under s. 276(2), she is to take into account the multiple factors in s. 276(3), which include "the right of the accused to make a full answer and defence" in s. 276(3)(*a*). Section 276 is designed to exclude irrelevant information and only that relevant information that is more prejudicial to the administration of justice than it is probative. The accused's right to a fair trial is, of course, of fundamental concern to the administration of justice. In a similar situation in [*R. v. Mills*, [1999] 3 S.C.R. 668] the Court preserved the right to make full answer and defence in the following commonsensical way, at para. 94:
>
> > It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.

[49] The trial judge then went on to consider whether to permit defence counsel to use the sex video in his cross-examination of the complainant.

> [33] The Crown submits that the complainant's statements are neither inconsistent nor contradictory. Furthermore, the Crown says that the Defendant is trying to establish the twin myths by playing for the jury video evidence purportedly showing the complainant engaging in consensual sexual activity with the Defendant at some other time.
>
> [34] The Crown, however, concedes that the Supreme Court of Canada held in *Darrach* at para. 35, that "[i]f evidence of sexual activity is proffered for its non-

sexual features, such as to show ... a prior inconsistent statement, it may be permitted".

[35] Although the Crown also concedes that the video is evidence of specific instances of sexual activity, it submits that the Defendant's attempt to adduce this video evidence fails the second and third prongs of the test outlined at section 276(2).

[36] As to the second prong of the test, the Crown states that the video evidence regarding separate consensual sexual activity between the parties is not relevant to the defence that the complainant consented to the alleged sexual assault. With this the Court agrees. But that is not the issue at trial for which the evidence is sought to be adduced.

[37] The evidence of the video and the text messages is intended to assist the Defendant in challenging the complainant on prior inconsistent statements (as related to the police), thereby undermining her credibility. Although the Crown acknowledges that credibility is always an issue at trial, it submits that the Defendant is merely attempting to adduce irrelevant (yet very explicit and prejudicial) evidence of the complainant's sexual history under the guise of credibility in order to circumvent Parliament's prohibition on adducing evidence that furthers the twin myths. Furthermore, says the Crown, because the text messages are not temporally connected to the sexual assault charges, they are of even less assistance to the Defendant.

[38] The Crown is mistaken. The complainant's credibility is the key element of the case. She put her attitude towards anal intercourse into issue by speaking of it with the police. It was irrelevant information because even if she had told the police that she enjoyed anal intercourse with the Defendant on many occasions, it was always open to her not to consent at the time in question. But because she said not only that she was against anal intercourse but also that the Defendant knew she was, evidence that may lead to an inference that those were untruths goes directly to her credibility and the Defendant's entitlement to make full answer and defence. It is therefore relevant to an issue at trial. The same is true of the text messages. Although their timing may result in the complainant being able to explain the apparent inconsistency with her statements to the police, they may still have significant probative value for the Defendant.

[39] This is not a situation in which the inconsistent statements are exposed through differences between a complainant's statements to the police and her evidence at trial (or at the preliminary inquiry). Here, the inconsistency with what was told to the police may be exposed by the video or the text messages. The evidence is tangible, and although it may be subject to interpretation, it is not totally reliant upon testimony of the Defendant. Importantly, neither the video nor the texts require evidence by a third party, thus avoiding one of the principal reasons why such evidence is sometimes not admitted in a trial.

> [40] To forbid the Defendant from adducing the video and the text messages would be to deny him the opportunity to make full answer and defence, provided that their significant probative value is not substantially outweighed by the danger of prejudice to the proper administration of justice. This balancing exercise will be conducted following the analysis of each of the remaining five issues in respect of the two threshold questions.

[50] Later in his decision, the trial judge decided to permit defence counsel to use a transcript of the sex video (but not the video itself) in cross-examination of the complainant.

> [75] Most problematic is the 46 minute video which depicts the Defendant and the complainant engaged in various sexual acts, including anal intercourse. The Court has already found that this evidence is relevant to the complainant's credibility. It was the complainant who put the issue of her dislike of anal intercourse and the Defendant's knowledge of that dislike into issue. I have discussed the implications of this above.
>
> [76] But a 46 minute sex tape is not the same as a series of text messages. Although neither relates directly to the circumstances of the assault, their respective implications for the complainant and potential effect on the jury are completely different in order and magnitude.
>
> [77] If the two previous categories of evidence that have been ruled admissible were sufficient to provide un-categorical ammunition against the complainant's credibility, then the Court may have decided that the prejudicial effect of the video substantially outweighs its probative value. That is, the Court could exclude certain evidence, not because it would not be probative, but because its added value to full answer and defence would be outweighed by its prejudicial value. As such, it would not assist in arriving at a just determination of the case. But that is not the situation here. The statements by the complainant to the police that she would never ask for anal intercourse and that the Defendant knew she was against it are most effectively contradicted by the video itself. As a result, we must balance each of the remaining section 276(3) factors against this substantial probative value.
>
> [78] Society's interest in encouraging the reporting of sexual assault offences would be adversely affected by the prospect of such a video being shown in open Court. In an era where still and moving images of sexual intimacy are frequently recorded, the chilling effect upon a complainant in a sexual assault charge of having to face the possible disclosure of such images is obvious. The potential of such evidence to cause prejudice to the complainant's personal dignity and right of privacy is also obvious. These prejudicial effects are not minor but severe.
>
> [79] Mid-trial and final instructions to the jury as to the limited purpose for which the evidence may be considered may not achieve the removal from the

> fact-finding process of any discriminatory belief or bias. Although relevant to credibility only, exposing the jury to the video would risk them falling into considering one or both of the "twin myths". This is because the evidence may arouse sentiments of prejudice, sympathy or hostility in the jury.
>
> [80] It is trite law that a criminal trial is not a tea party. A person charged with an offence is entitled to mount and [sic] vigorous and unyielding defence. The paramount consideration is the ability to make full answer and defence. Where the evidence directly bears on the right to make full answer and defence, generally privacy rights must yield to the need to avoid convicting the innocent. A person who alleges that she has been sexually assaulted exposes herself to revelations of private and personal matters. But there are limits as to how far these revelations may go — section 276 acts as a specific curtailment and engages the Court in a delicate balancing exercise.
>
> [81] Is there a mechanism that would permit the probative value of the video to be put before the jury while at the same time ameliorating its prejudicial effect? Appended to the Defendant's affidavit is a transcript of the video, prepared by the Defendant himself. The Court has reviewed both and is satisfied that the transcript, albeit not perfect, is a good representation of what is said in the video. The Crown concedes this. Could the transcript be used by the Defendant as an aid in cross-examining the complainant? The Court finds that it can.

[51] The trial judge did not close the door entirely on the use of the sex video. As he indicated in the following passage, whether he would permit its use would depend on what the complainant said in her testimony.

> [89] Obviously, a transcript cannot convey emotion or nuance as well as can a video. To paraphrase Green, C.J.N.L. at para. 40 of *R. v. Ryan*, 2012 NLCA 9, "having the sterile transcript is not the same as actually being able to view and hear what the [participants in the video] were [doing and] saying". Depending on the responses given by the complainant to questions relating to the transcript of the video, therefore, the video itself may have to be adduced. Such a determination would be premature at this stage of the proceeding, however, and the Court holds that a subsequent voir dire would be required before the video itself would be considered for admission into evidence at the trial.

[52] Mindful as I am of the admonitions of the Supreme Court of Canada to Courts of Appeal to show deference to trial judges in their rulings, I am nonetheless compelled to say that in my view the trial judge was wrong in his analysis and erred in his application of the law of evidence.

[53] Let me begin with the inconsistency identified by defence counsel. The complainant said to police that she did not prefer anal intercourse, but that she engaged in it to fulfill the desires of the accused. The inconsistency

alleged by defence counsel was that instead of going along with the accused, the complainant instead willingly had anal intercourse with him. This is a very narrow difference, if a difference at all.

[54] If the complainant had said something like "I would never willingly engage in anal intercourse", then the inconsistency with doing so in a sex video with the accused would be clear. But the complainant said nothing of that nature.

[55] The video (or its transcript) shows at most the complainant as a willing partner with the accused in anal intercourse. I fail to see any meaningful difference between that and her statements that she engaged in anal intercourse to fulfil the accused's desires. Thus, I would question whether it has <u>any</u> probative value as regards the complainant's credibility.

[56] Even if one were to take the view that the inconsistency is meaningful and has <u>some</u> probative value as regards the complainant's credibility, this must be weighed against the potential "danger of prejudice to the proper administration of justice", including the factors set out in s. 276(3), notably the potential to feed the myth that because the complainant consented in the video she is more likely to have consented to sex on the two occasions when she alleged that she had not.

[57] These points need to be considered in the context of how the transcript of the video was used by defence counsel in his cross-examination of the complainant.

> Q. [T]his is the preliminary inquiry,
>
> "The lights were out. I was trying to get to sleep and he turned on the computer and he was watching pornography. He was, this is odd, I mean, I can't describe what he was watching. It was disgusting. It was anal sex, was what he was watching."
>
> A. Mmm mph.
>
> Q. Correct? A. Yeah.
>
> Q. So, on at least three separate occasions, again, in this Court, you have indicated that you did not like anal sex, that he forced it on you and you, in fact, have indicated on this date, it was about 12 to 18 months after you were married? A. Mmm mph.

Q. That the anal sex took place, correct? A. I'm not saying that I never, ever had anal sex that I didn't consent to. Never. It's not something that was my first choice but obviously I done it.

Q. It wasn't your first choice? A. No.

Q. Well, you know, I put it to you that I have three statements here. A. It's not my first choice but I've done it, many times.

Q. (as read)

> "It wasn't something that I wanted to do. He knew I was against having anal sex."

A. Mmm mph.

Q. (as read)

> "I can't describe what he was watching, it was disgusting. It was anal sex was what he was watching."

My take from those things, the clear impression left with the police and the information given to the Court was that you were against anal sex and didn't want to have anything to do with it? A. So, I was, against it, but I knew that he wanted it. He was my husband.

Q. Did you ever make a video with your husband? A. I did.

Q. A video in which there's various sexual acts? A. Yeah.

Q. Portrayed? A. Sorry.

Q. A video in which there's various sexual acts portrayed? A. Yup.

. . .

Q. You were against anal sex, didn't like it, didn't want to have it, told the police that, and told the police twice, told the court it once. That is a transcription of the video which you say you've looked at.

> [S.B.], "Stand up again, I want to look see you, mama."
>
> [C.M], "Whoops, oh, well."
>
> [S.B.], "My little hottie, oh yeah, turn around. Don't go anywhere. Stay where you are. Hmm, yeah."

[C.M.], “What do you want, baby?”

[S.B.], “Oh”.

[C.M.], “To stick that hard cock in it later.”

[S.B.], “In what, baby?”

[C.M.], “In my ass.”

[S.B.], “In where?”

[C.M.], “Right there.”

[S.B.], “yeah.”

[C.M.], “Mmm.”

[S.B.], “Looks good.”

[C.M.], “That big cock of yours.”

[S.B.], “Yeah”.

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[S.B.], “What do you want me to do to you tonight, baby?”

“I want you to fuck your slut wife, baby.”

“Are you my slut wife, baby?”

“I’m your slut wife, baby, yes.”

“What kind of a slut are you, baby?”

[C.M.], “Yeah, ass slut.”

[C.M.], “You’re gonna make me come while your cock is in my ass?”

I can continue, but I don’t want to. A. Can I comment?

Q. Please. A. And what do you think the conversation might have been before that video? Would it be any likelihood that that was a conversation that we were role playing for the video?

Q. Well, I tell you now - A. Is that likely?

Q. You be very careful when you go down this road. A. I'm just asking.

Q. Because you be very careful before you go down this road, because I got no urge, believe me to put on the sex tape of you and [S.B.]. A. Go ahead.

Q. And let the jury watch it, but they'll make a decision if you're saying that you were forced into this. A. I never said I was forced.

Q. Into this tape? A. I did not say that I was forced.

Q. Well, what are you saying, Miss? A. I said, you don't know what the conversation was before this video, did I not?

Q. Well, what the conversation - A. I did not say forced.

Q. - [C.M.], is, I can continue on with this, but there's 46 minutes and 20 seconds of, and I'm not being judgmental, because it's none of our business - A. Right.

Q. - what you and your husband do - A. Right.

Q. - in the privacy of your bedroom. That is absolutely correct. None of anybody else's business but when you tell the police, twice. A. Mmm mph.

Q. You tell the provincial court judge and you clearly leave the impression here you were against anal sex, that is not what this transcript, nor the video that it's made from, which goes 46 minutes long and at the end of it two you ye sit back and relax and appear to be having a very good time, indicates. It indicates the exact opposite of that. That not only were you into having anal sex, that you were very into having it? I'm not, the issue, it's just that that's not the impression you left with everybody. A. As I just said five minutes ago, that I done it, it wasn't my first option, my first choice but, yes, I done it.

[58] If one accepts that there was an inconsistency to be drawn out in cross-examination, what probative value was there in defence counsel reading from the transcript of the sex video? I see little or none.

[59] By contrast, it seems to me there was considerable prejudicial effect. Let me repeat some key lines by the complainant:

"I want you to fuck your slut wife, baby."

> "I'm your slut wife, baby, yes"
>
> "Yeah, ass slut."

[60] *The Shorter Oxford English Dictionary* defines "slut" as "a sexually promiscuous woman". Nominally, defence counsel read this out before the jury to test the complainant's credibility. But, that is being either naïve or disingenuous. The entirely predictable effect was to signal to the jury that by her own words the complainant was promiscuous and, therefore, she was more likely to have consented to sex on the two occasions when she alleged that she had not.

[61] The trial judge had read the transcript of the sex video. In his ruling he gave the green light for defence counsel to do what defence counsel then proceeded to do. In so deciding, the trial judge permitted evidence to be put before the jury that should not have been before them.

[62] Following the cross-examination of the complainant the trial judge instructed the jury as follows:

> You've heard [C.M.] testify with respect to a video that was made of sexual activity between her and [S.B.] and text messages concerning sexual activity between her and a third party, you may use that evidence to help you assess whether [C.M.] was truthful when she made mention of certain things in her statements to the police and at the preliminary inquiry. Specifically, was she truthful when a) she said that she was against anal intercourse and that [S.B.] knew she was against anal intercourse and b) when she said that she did not have a sexual affair while she was married to [S.B.]. You may not use that evidence, however, to help you decide that because of the sexual nature of that activity, [C.M.] is more likely to have consented to what [S.B.] is alleged to have done here. You must also not use the mere fact that [C.M.] engaged in sexual activity with the accused and with another man, to help you decide whether [C.M.] is less believable or reliable as a witness in this case. And, again, I will repeat these instructions at the end of the trial.

[63] This was a proper instruction. However, the damage had been done. The first of the twin myths had been fed. The instruction could not undo that.

[64] I reach this conclusion being mindful of the extensive jurisprudence to the effect that a proper instruction to the jury can in most instances ensure that the jury uses evidence for a limited and proper purpose only. (See *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, para. 72.) However, in the

circumstances of this case, the situation was beyond redemption by any instruction.

Recent Fabrication

[65] In the course of his cross-examination of the complainant, Defence counsel suggested that the complainant had fabricated allegations of sexual assault against the accused because he had exposed to her employer that the complainant had been untruthful as to her work experience; this resulted in the complainant being dismissed by her employer. The complainant denied that she had fabricated the allegations.

[66] Ordinarily, the fact that a complainant has told someone about an alleged incident is not admissible, on the basis that a statement becomes no more worthy of belief by its repetition. The term usually applied is that "oath-helping" is not permitted.

[67] An exception to this is a situation where it is suggested that a witness (here the complainant) has fabricated a story in response to something done to him or her. The term used is recent fabrication.

[68] For example, if a complainant reports a sexual assault to police on day 3, it is a challenge to her credibility if defence counsel suggests that she made the allegation on day 3 as revenge for some harm done to her by the accused on day 2. In such a situation, the Crown is ordinarily permitted to present evidence from a third party that on day 1 the complainant had told her about the sexual assault that she later (on day 3) reported to police. The third party's evidence does not help prove that the complainant's allegation is true; however, it does help rebut the suggestion that the allegation was fabricated by the complainant in response to what the accused did to the complainant on day 2. See *R. v. Taylor*, 2014 NLCA 6, para. 22-24.

[69] In his cross-examination, defence counsel suggested that the complainant had fabricated allegations of assault against the accused following threats by her that he would "be sorry" because of personal differences between them (relating to her daughter). The complainant denied she had fabricated the allegations.

[70] The Crown sought to lead evidence from third parties that the complainant had told them about the alleged assaults and that the complainant had done so before she "threatened" the accused.

[71] However, the trial judge did not permit the Crown to lead this evidence from the third parties.

[72] Here is what the trial judge wrote in denying the Crown's application:

> 15 The Court is satisfied that the issue of recent fabrication has been raised by the Defence in its questioning of C.M. on the "threats" made by her that S.B. would "be sorry" just prior to her accusing him of various assaults. Based upon the cross-examination there was left with the jury a clear inference that the allegations of assault were the promised retribution exacted by C.M. against S.B. Is there evidence of prior consistent statements by C.M. that pre-date the "threats" and which could bolster her credibility and negate the inference of recent fabrication? The Court finds that there is.
>
> 16 J.M. is the mother of C.M.'s former husband and is the grandmother of K. On review of her statement to the police, it is obvious that J.M. disliked S.B. This was at least partly because he took C.M. away from her son and later was, in her view, instrumental in having charges brought against her son for assaulting C.M. and breaching the terms of a peace bond. In her May 28, 2012 statement to the police, J.M. stated that her sources of knowledge of physical assaults by S.B. upon C.M. were C.M. and K. - C.M. and S.B. were violent towards each other "...on a weekly basis from what I can hear". It is not entirely clear from her statement what C.M. told her and what she heard from K. but it is safe to assume that C.M. did describe to J.M. incidents of assault by S.B. against C.M. These refer to specific incidents, e.g. he grabbed her throat, "he had her on the stairs one time", and one time he had a knife to her throat. No more specifics were provided.
>
> 17 A.M. is C.M.'s niece and worked with her. In a statement given on June 12, 2012, she described to the police taking photographs of bruising on C.M.'s eye, neck and thumb which one can infer came from an alleged physical altercation between C.M. and S.B. A.M. also related to the police a list of other assaults that C.M. told her about, including being grabbed by the throat, being choked and having a knife held to her throat.
>
> 18 V.S. met C.M. at her work place and they became friends. C.M. told V.S. about various incidents of assaults by S.B., including pinning her against the wall at his mother's house and grabbing C.M.'s throat on two occasions, V.S. was also at C.M.'s workplace when C.M.'s face was "beat up". Although C.M. did not tell her what happened, V.S. inferred that the injuries were caused by S.B.
>
> 19 Each of the statements made by the three women referred to would contain at least some suggestion by C.M. that S.B. had physically assaulted her before the threats of May 2012 that give rise to the motive to lie. As a result, they could be admitted to negate any inference of recent fabrication.

20. I find, however, that it would be unfair to the Defendant to permit such evidence to be introduced at this stage of the trial. The evidence of J.M., A.M. and V.S. relating to prior consistent statements should not be adduced without the Defence having had an opportunity to cross-examine C.M. in respect of the prospective evidence. The Crown says that it will make C.M. available. It has not applied to do so and no authority was presented that would support such an application. The Court is aware, of course, of the Supreme Court of Canada decision in *R. v. P. (M.B.),* [1994] 1 S.C.R. 555 at paras. 20-21, where Lamer, C.J.C., for the majority held:

> Traditionally, courts in Canada and in England have treated the stage reached in a proceeding as correlative to prejudice and injustice to the accused. That is, a court's discretion with respect to reopening will be exercised less readily as the trial proceeds. The point is illustrated by taking the following three stages in a trial:
>
> (1) before the Crown closes its case,
>
> (2) immediately after the Crown closes its case but before the defence elects whether or not to call evidence (most commonly, this is where the defence has moved for a directed verdict of acquittal for failure by the Crown to prove some essential ingredient of its case), and
>
> (3) after the defence has started to answer the case against it by disclosing whether or not it will be calling evidence.
>
> In the first phase, before the Crown has closed its case, a trial judge has considerable latitude in exercising his or her discretion to allow the Crown to recall a witness so that his or her earlier testimony can be corrected. Any prejudice to the accused can generally be cured at this early stage by an adjournment, cross-examination of the recalled witness and other Crown witnesses and/or a review by the trial judge of the record in order to determine whether certain portions should be struck.

21 It is important to note that the recalling of C.M. would not be for the purpose of "correcting" her evidence. No detail of a crucial date or location, for example, was inadvertently omitted in her testimony. The recall would be for the purpose of eliciting the prior consistent statements and permitting resulting cross-examination which would set the stage for adducing the proposed testimony from the three identified witnesses.

22 Although the Defence says that the prior consistent statements should not be adduced by J.M., A.M. and V.S., without C.M. being recalled, it opposes her recall. This is for two reasons. First, Defence counsel submits that the new testimony by C.M. would be focused on the prior consistent statements thereby giving them undue prominence before the jury with resulting prejudice to the

Defendant (beyond, of course, the inherent prejudicial value of evidence that is not favourable to the Defence). Second, the Defence would require an adjournment to prepare its renewed cross-examination of C.M. and to adjust its intended cross-examination of J.M., A.M. and V.S.

23 If this were not a jury trial I might have been more predisposed to exercising my discretion in favour of the Crown's request. But as it is, prior inconsistent statements are a challenge in a jury trial — it is possible for the jury to slip from considering them for the permitted purpose to considering them for the truth of their contents, notwithstanding a carefully worded limiting charge by the trial judge. Hence, the requirement that the "limit on the use of prior consistent statements has been applied with particular rigor in jury trials". If C.M. were to be recalled for this limited purpose then I agree with the Defence that it may cause the jury to place inordinate emphasis on the prior consistent statements thus elevating that evidence beyond its limited purpose.

24 As noted, the failure to make timely application for admission of the prior consistent statements is not one of mere inadvertence. Recent fabrication relating to the charges of sexual assault was raised by the cross-examination of Sergeant Osmond. There, the Crown raised the issue in re-direct by asking questions that went to anchoring the sexual assault complaints in a time frame prior to the event giving rise to a motive to lie. Although the Defence objected, I allowed the questioning as referred to above. Additionally, C.M. was cross-examined extensively on the "threats" with respect to their timing in relation to the laying of the assault charges. The Crown could have done with respect to C.M. what it did with Sergeant Osmond - that is, seek leave to explore any prior consistent statements (perhaps, however, by anticipating an objection and seeking a ruling by me in the absence of the jury). The Crown did not do so and it would be prejudicial to the accused to permit it to do so now.

25 Furthermore, the Crown is being permitted to call A.M. and V.S. to testify as to the bruising that they observed on the neck, face and thumb of C.M. That will provide some basis for it to negate any allegation of recent fabrication by adding to what might otherwise be an incomplete picture.

26 To permit the evidence to be adduced, including the necessary recalling of C.M., would serve to prolong the trial. It would also unduly complicate the proceeding, risking a "mini-trial" on the prior consistent statements and confusing the jury.

27 The Crown concedes that it would be unfair at this point in the trial to go into specific details or complex statements regarding the prior consistent statements. It contends that this last concern can be ameliorated by having each of J.M., A.M. and V.S. testify simply that C.M. told her that she had been assaulted by S.B. Although attractive at first glance as addressing the last point raised in *Hunter* as quoted above, on reflection, it would not be of assistance. This is

> because the Defence has not only raised recent fabrication with respect to C.M., but also fabrication *simpliciter* - the Defence strategy has been to portray C.M. as a witness with no credibility whatsoever, making the entirety of her evidence unreliable. The Defence would want to cross-examine each of C.M., J.M., A.M. and V.S. on the circumstances of what was said and whether it was believable at the time thus leading to the very unfairness acknowledged by the Crown.

[73] The trial judge placed considerable emphasis on two factors in denying the Crown's application:

(1) the complainant would have to be recalled to testify as to what she had told others; and

(2) the Crown (in the judge's view) should have anticipated that defence counsel would suggest recent fabrication in his cross-examination and, therefore, the Crown should have dealt with the prior consistent statements made to others by the complainant in her examination-in-chief.

In my view, both factors were dealt with improperly.

[74] Defence counsel completed his cross-examination of the complainant on a Friday afternoon. Crown counsel was asked whether he had any questions on redirect; he said no. The trial was adjourned to resume the following Tuesday.

[75] At the commencement of the hearing on the Tuesday, Crown counsel sought to have the complainant recalled so she could testify as to what she had told others, to rebut defence counsel's suggestion of recent fabrication.

[76] As a practical matter, what difference would it have made if defence counsel had said on Friday afternoon what he said first thing Tuesday morning? The answer is none. Nothing happened in between save the passage of the weekend and the Monday, when the court did not sit. It was unreasonable for the judge to attach any significance to recalling the complainant on Tuesday morning, as opposed to having questions put to her on redirect on Friday afternoon.

[77] As to the judge's view that Crown counsel should have led evidence from the complainant on examination-in-chief concerning what she said to others (her prior consistent statements), this seems to me to be simply wrong. It would have been improper for Crown counsel to elicit such testimony from the complainant save in response to a suggestion of recent fabrication by defence counsel, which could only come in the course of

defence counsel's cross-examination. Almost certainly, the trial judge would have ruled out of order questions put by Crown counsel in examination-in-chief the purpose of which would be to elicit from the complainant prior consistent statements that she made to others. The basis for this is clear; such statements are admissible in order to rebut a suggestion of recent fabrication, but not otherwise. The trial judge created a "Catch 22" situation for Crown counsel. In my view, the trial judge erred when he said Crown counsel should have sought to lead evidence of prior consistent statements in his examination-in-chief of the complainant.

[78] The Crown also sought to lead evidence from third parties that the complainant had told them about the alleged sexual assaults and that the complainant had done so before the accused contacted the complainant's employer, resulting in her dismissal.

[79] However, the trial judge did not permit the Crown to lead this evidence from the third parties. Here is what the trial judge wrote in his decision denying the Crown's application (*R. v. S.B.*, 2014 NLTD(G) 83):

> 28 Any statement made by C.M. to J.M. regarding sexual assaults by S.B. may not be adduced in evidence for the same reasons as given above. As to any evidence that may assist in negating an inference of recent fabrication, and thereby helping to complete the picture, the Crown was permitted to adduce evidence from Sergeant Osmond information disclosed in May of 2012 to the R.C.M.P. relating to allegations of sexual assault by S.B. against C.M., thereby predating both the loss of C.M.'s employment and her September 2012 allegations.
>
> 29 As importantly in this instance is the quality of the evidence itself. In her statement to the police, J.M. said that C.M. had lied to her on many occasions. J.M. did tell the police, however:
>
> > ...sex was an issue too. If [S.B.] didn't get his way there and sometimes ah the violence came from that when she said no, if she was a bit tired like she didn't want to but to me I said well you're being, not only are you being assaulted physically assaulted but you're being raped too and that happened too. That's sexual assault along with physical....
>
> 30 Not only is the foregoing not consistent with any of the particulars of C.M.'s two allegations of sexual assault against S.B., it references no prior consistent statement by C.M. — that is, it is J.M. who says that C.M. was sexually assaulted, not C.M. herself.

> 31 Because the statement is not a direct statement of C.M., J.M. would have to be examined in chief by Crown counsel in an attempt to elicit a clearer prior consistent statement by C.M. to J.M. Such an examination would go beyond what is permissible given the presumptive inadmissibility of such statements. Even if a prior consistent statement by C.M. was elicited during examination-in-chief or can be inferred from the excerpt from J.M.'s statement quoted above, the context of J.M.'s evidence would require an extensive cross-examination in respect of her relationship with C.M., her relationship with S.B. and whether she believed C.M. This would require a further "mini-trial" into these collateral issues, thereby deflecting the jury from their core task and unduly prolonging or complicating the proceedings.
>
> 32 The Crown is not permitted to adduce evidence of prior consistent statements of C.M. alleged[ly] made to J.M., A.M. and V.S.

[80] The trial judge also denied two further applications by Crown counsel to lead evidence to rebut recent fabrication. The first, related to questions sought to be put to defence witnesses concerning statements made to them by the complainant. The second related to text messages sent by the complainant to the accused "in which she made reference to physical assaults by him, including choking and holding a knife to her throat". The Crown sought to use these text messages in its cross-examination of the accused. In both instances, the trial judge used similar reasoning to that set out above. In the result, the Crown was not permitted to lead evidence to rebut the suggestions of recent fabrication made by defence counsel in his cross-examination of the complainant. In my view, this was a serious error by the trial judge, one that undermined the truth-seeking function of the trial.

Overturning a Jury Acquittal

[81] In *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 Justice Fish, affirming *R. v. Morin*, [1988] 2 S.C.R. 345, wrote at para. 14:

> It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.
>
> (Emphasis added.)

[82] In *R. v. Luciano*, 2011 ONCA 89, 267 C.C.C. (3d) 16, the Ontario Court of Appeal dealt with the application of *Graveline* to legal errors in rulings on the admissibility of evidence:

> [259] On an appeal from acquittal, the Attorney General cannot succeed simply by demonstrating a legal error in the conduct of the trial, for example, in a ruling about the admissibility of evidence. Nor can the Attorney General succeed on an appeal from an acquittal on the basis of some abstract or purely hypothetical possibility that an accused would have been convicted were it not for the error of law. Something more is required. And that something more is to satisfy the appellate court that the error might reasonably be thought, in the concrete reality of the case, to have had a material bearing on the acquittal: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.
>
> [260] It is worth reminder that the appeal of the Attorney General is from the *acquittal*, not the admissibility ruling that is said to constitute an error in law. What is required is a demonstration of a legal error (in the admissibility ruling) and a nexus between the legal error and the verdict rendered (an acquittal). The authorities teach that acquittals are not to be overturned lightly. The Attorney General must establish that the verdict would not necessarily have been the same had the error not been made: *Graveline* at para. 16; *R. v. Sutton*, 2000 SCC 50 (Can LII), [2000] 2 S.C.R. 595, at para. 2; and *R. v. Vezeau*, 1976 Can LII 7 (SCC), [1977] 2 S.C.R. 277, at pp. 291-292.

I would adopt the foregoing.

[83] Counsel for the accused, while maintaining that the trial judge did not err regarding the text messages concerning the sex video with the accused or refusing to allow evidence to rebut recent fabrication, in the alternative argued that if the trial judge erred regarding one or more of the foregoing, nonetheless, a new trial should not be ordered, having regard to the test set out in *Graveline*, set out above.

[84] The thrust of respondent counsel's argument is that the complainant had so undermined her credibility by her untruths and inconsistencies that the Crown cannot satisfy this court that the "error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal."

[85] In this regard, counsel for the respondent urged on us the following by the complainant:

(1) her untruth in the work experience she told [an employer] that she had;

(2) her untruth in the work experience she told [her subsequent employer] that she had;

(3) her untruth in the statements she made to police that she had been faithful to the accused during their marriage;

(4) the inconsistency between the statements to police by the complainant concerning her predilection regarding anal intercourse and the attitude she exhibited in the sex video with the accused;

(5) the inconsistency between what the police testified they told the complainant when they brought her daughter (K.S.) home (considerable detail of K.S.'s activities) and what the complainant testified that the police had told her (very little);

(6) the inconsistency between the complainant's statement to police that she had been "flipped off" the bed by the accused pulling on the bed clothes during an argument and her testimony that she had gotten off the bed when the accused had pulled on the bed clothes;

(7) the inconsistency between the complainant's statement to police that the accused on one occasion had held a knife touching her throat and her testimony that the accused had held the knife in front of her face, but not touching her throat;

(8) the inconsistency between the complainant's testimony that she was largely unaware of her daughter's substance abuse and e-mails from the complainant to her daughter that suggested she was aware of her daughter's substance abuse;

(9) inconsistencies between the statement given to police and the complainant's testimony on examination-in-chief concerning details of the behind the church incident (e.g. how much the complainant had to drink and why she and the accused did not have sexual intercourse on that occasion);

(10) inconsistencies between the statement given police and the complainant's testimony on examination-in-chief concerning details of the alleged assault on the stairs (where the complainant's shoulder and arm broke through gyproc on the wall).

[86] I would say regarding the foregoing:

(1) the complainant was shown to have been untruthful to her employer, which she admitted at trial,

(2) the complainant was clearly shown to have been untruthful to her next employer, which she admitted at trial;

(3) the complainant was shown to have been untruthful in her statements to police concerning her lack of faithfulness to the accused during their marriage, which she admitted at trial;

(4) the inconsistencies between what the complainant said in her police statements, her conduct in the sex video with the accused and what she testified at trial concerning anal intercourse are so minor as to be of little consequence;

(5) the inconsistencies between what the police said they had told the complainant concerning her daughter's activities and what she testified the police had told her were considerable and never explained;

(6) the inconsistencies between the complainant's statements concerning being "flipped off" the bed by the accused and her testimony in examination-in-chief concerning these events related to details and are not significant;

(7) the inconsistencies between the complainant's statements to police and her testimony in examination-in-chief concerning the alleged knife to the throat incident relate to details, but nonetheless there is a difference concerning the reported position of the knife;

(8) the inconsistencies between the complainant's testimony that she was largely unaware of her daughter's substance abuse and certain e-mails to her daughter tend to indicate a degree of evasiveness as to how much she had been aware of;

(9) the inconsistencies as to the details of the behind the church incident, to the extent they exist, are inconsequential;

(10) the inconsistencies between the statement given to police and the complainant's testimony on examination-in-chief concerning the details of

the alleged assault on the stairs, to the extent that inconsistencies exist, relate to details and are of no consequence.

[87] The foregoing is a mixed bag of significant untruths, a few notable inconsistencies, but mostly minor ones, and several alleged inconsistencies that I do not see as existing. These untruths and inconsistencies must be looked at for their cumulative impact and not merely one by one.

[88] I would conclude that, notwithstanding the serious errors made by the trial judge outlined above, the jury verdict should not be set aside. I have reached this conclusion with reluctance given the unfair manner in which the complainant was dealt with. Nonetheless, I am persuaded by counsel for the respondent that the complainant, by her untruthfulness and the inconsistencies in several areas of her testimony, gravely undermined her credibility; in a case that turned in very large measure on the complainant's testimony, this undermining of her credibility could properly give rise to a reasonable doubt. Accordingly, the nexus between the legal errors and the verdict required by *Graveline*, *supra*, and *Luciano*, *supra*, has not been shown.

CONCLUSION

[89] The appeal is dismissed.

_____

M . H. Rowe J.A.

I Concur: _____

C. W. White J.A.

Dissenting Reasons by Green C.J.N.L.

[90] I am in agreement with the analysis of my colleague, Rowe J.A., leading to his conclusions that the trial judge erred (i) in permitting the degree of cross-examination of the complainant with respect to the emails and the sex video; and (ii) in refusing the Crown the right to recall the

complainant and to examine other witnesses with a view to rebutting a suggestion of recent fabrication.

[91] I must disagree with my colleague, however, when he concludes that, notwithstanding these errors by the trial judge, he would nevertheless dismiss the appeal and affirm S.B.'s acquittals. I have concluded that the proper remedy is to set aside the acquittals and order a new trial. My analysis follows.

[92] Paragraph 676(1)(a) of the *Criminal Code* permits an appeal against a verdict of acquittal on a ground of appeal that involves a question of law alone. On such an appeal, paragraph 686(4)(b)(i) provides that the basic remedy, if the appeal is allowed, is to order a new trial. However, the case law emphasizes that it does not necessarily follow that just because an error of law is found a new trial will always result. There must be a nexus between the error of law and the resulting acquittal that effectively calls into question its reliability: *R. v. Strongitharm*, 2016 NLCA 7 at paragraphs 22-23. It must be remembered that an appeal is against an *acquittal*, not just the identified *error* leading to that acquittal: *R. v. Luciano*, 2011 ONCA 89, 267 CCC (3d) 16. Fish J., writing for the majority in *R. v. Graveline*, 2006 1 S.C.R. 609 put it this way:

> [14] It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[93] The standard for ordering a new trial as a result of identified legal error is therefore whether the errors "might reasonably be thought, in the concrete reality of the case, to have had a material bearing on the acquittal." While that in itself is a high burden for the Attorney General to surmount, it does not, nevertheless, require a degree of persuasion that the verdict would "necessarily" have been different. As noted in *R. v. Morin*, [1988] 2 S.C.R. 345, by Sopinka J. at p. 374:

> Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do.

Thus, "certainty" of a different verdict is not required. At most it is only a "reasonable degree" of certainty: *Morin*, p. 374.

[94] The standard is applicable, not only where the trial judge makes an error giving instructions to the jury but also in situations where he or she errs in admitting or excluding evidence in the course of the trial: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720.

[95] In *R. v. Wright*, 2012 ABCA 306, for example, the Alberta Court of Appeal concluded that the trial judge in a judge-alone sexual interference trial had erred in admitting prior sexual history evidence and, as a result, set aside an acquittal and ordered a new trial. The Court referred to the fact that s. 276(1) of the *Criminal Code* prohibited the admission of prior sexual history evidence to support the "twin myths" that a complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge and that she is less worthy of belief by virtue of having engaged in prior sexual activity, and then concluded:

> [16] We cannot say that the trial judge would have entered an acquittal without this evidence. … We are persuaded that the inadmissible evidence may have had a material bearing on the acquittal.

[96] The focus should be, not on what this Court thinks the jury might have done on the different evidentiary record, but on whether it can reasonably be said that, in the absence of the impugned evidence, the verdict of acquittal might have been affected, i.e. on whether the error might reasonably have had a "material bearing" on the acquittal. That question should be analyzed on a more objective basis, looking at the seriousness of the potential impact that the impugned evidence could have had on the analytical thinking of the jury and whether in its absence, the reasoning process would likely (or as stated in *R. v. Sutton*, [2000] 2 S.C.R. 595, a case cited with approval in *Graveline*, "necessarily") be the same.

[97] In *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 leave to SCC denied [2010] SCCA No. 125, the Ontario Court of Appeal allowed an appeal from an acquittal by a jury where the judge erred in excluding relevant expert evidence, relying on *Graveline.* Doherty J.A. explained:

> [175] The Crown has met its burden. The excluded evidence must be looked at as a whole. … I do not suggest that a jury would necessarily take [a different view] of the evidence [if the excluded evidence had been admitted]. I say only that a

> reasonable jury could take that view. If it did, the verdict could very well have been different.
>
> (Emphasis added.)

A similar conclusion was reached in *R. v. Spackman*, 2012 ONCA 905.

[98] By contrast, in *R. v. Laird*, 2015 ONCA 414 leave to SCC denied [2015] S.C.C.A. No. 402, the Ontario Court of Appeal declined to order a new trial on an appeal by the Crown from a jury acquittal. The Court concluded that the trial judge did not err in admitting an accused's statement to police or in refusing to excise parts of the statement before it was shown to the jury on the ground that the emotional statements in it would have overwhelmed the jury. In o*biter*, Laskin J.A. nevertheless expressed the view that even if the judge had erred in admitting the statement, the Crown had failed to demonstrate that, without the jury seeing the statement, the verdict would necessarily have been the same. Laskin J.A. considered, amongst other things, the facts that the judge had given careful and extensive mid-trial and post-trial instructions on the limits for which the statement could be used, that allowing the jury to see the statement was not "unfairly prejudicial," and that the strength of the Crown's case was 'dubious" in any event. He concluded:

> [85] … To meet the standard for obtaining a new trial the Crown has to do more that show Laird's statement had no probative value. It has to show that allowing the jury to see Laird's police statement was unfairly prejudicial and because of this prejudice, the admission of the statement affected the verdict.
>
> [86] In my opinion the Crown cannot meet that burden. … [T]he jury was well-equipped to fairly assess its significance. It had the benefit of the Crown's cross-examination, and the trial judge's correct jury instructions on the proper uses of the statement. …
>
> [88] Moreover, the Crown's case itself – at least in the trial judge's opinion – was not particularly strong.

[99] In the current case, we have ruled that the trial judge erred both in admitting certain evidence (the details of the text messages about the complainant's admitted affair, and the details of the conversations between the complainant and the accused in the transcript of the sex video) and in excluding certain other evidence (potentially rebutting suggestions of recent fabrication). We have also ruled that allowing the text messages and the transcript of the sex video to be used as they were had the potential of

feeding the first of the twin myths and that in the circumstances a proper jury instruction could not undo that damage (see paragraphs 44 and 63 - 64 above). This distinguishes *Laird* from the current case.

[100] I would also add that had the evidence rebutting recent fabrication been allowed, it might well have gone some way towards rehabilitating the complainant's credibility thereby changing the jury's view of the reliability of the complainant's evidence. One cannot be sure, of course, because we do not know what aspects of the overall evidence ultimately was the tipping point for the jury to conclude that the case had not been proven beyond a reasonable doubt; nevertheless, it is not fanciful to say that if the evidence potentially fueling the twin myths had not been admitted and the evidence rebutting recent fabrication had not been excluded, the jury might well have taken a different view of the credibility of the complainant and hence of the whole case.

[101] In this case, the type of evidence that was improperly placed before the jury was particularly pernicious. By prohibiting admission of sexual history evidence to support the inferences leading to the twin myths, Parliament has signaled that because of the significant dangers of influencing the jury to engage in lines of reasoning based on those myths, it is not sufficient to allow them to hear it even with an appropriate cautionary instruction. Subsection 276(1) of the *Criminal Code* forbids their hearing it at all. In other words, the jury is regarded by Parliament as *not* being, to borrow the phrase in *Laird* quoted above, "well-equipped" to assess and deal with the evidence.

[102] It is only where that type of evidence is to be used for some other legitimate purpose that it may become admissible and then only after balancing probative worth against potential prejudicial effect and giving a careful limiting jury instruction. In making that determination, the judge must consider, amongst other things, the need to remove from the fact-finding process any discriminatory belief or bias and the risk that the evidence may unduly give rise to sentiments of prejudice, sympathy or hostility in the jury: *Criminal Code*, s. 276(3)(d) and (e).

[103] In other words, the use of this evidence is fraught with great dangers that the jury may use and rely on it in an inappropriate manner if care is not taken with respect to both its admissibility and subsequent use.

[104] Counsel for S.B. submitted that even granting the errors of law committed by the trial judge, there were so many other frailties in the testimony of the complainant that the ultimate verdict would have been an acquittal in any event even if the jury had not been exposed to the evidence that had been improperly admitted and had had the benefit of the evidence designed to rebut recent fabrication. The trouble with this submission is that it invites this Court to embark on an assessment of the remaining evidence, without having seen or heard the witnesses in context, and to reach a conclusion – on an evidentiary record that is different from what the jury had before it – that the jury would nevertheless had to have had a reasonable doubt and acquitted. Furthermore, it would require this Court to attempt to assess the weight and significance of the evidence rebutting recent fabrication and its potential impact on the jury without having heard it. That effectively involves placing this Court in the position of the jury and requiring it to make its own assessment of the evidence or potential evidence. This is the very thing that appellate courts in other contexts have been admonished for doing. (See, e.g., in the context of determining whether a verdict is unreasonable, *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180.)

[105] My colleague has succinctly summarized and discussed in paragraphs 85 - 87 above the other untruths and inconsistencies in the complainant's evidence which counsel for S.B. submits also undermine her credibility. Most of these items, however, relate to peripheral matters that do not deal directly with the charges at hand. While untruths and inconsistencies on tangential matters can, indeed, be relied on by a jury in assessing credibility, the further they are from the events surrounding the charges at hand the greater is the likelihood that a jury may nevertheless disregard them and not allow them to affect their assessment of credibility on matters crucial to the charges. A jury is not required to make an adverse finding of credibility just because a witness is untruthful in some respect or gives inconsistent testimony.

[106] These are the sorts of inconsistencies, half-truths and lies that a jury, after considering the whole of the evidence (which in this case should not have included the offending evidence from the text messages and video but should have included the evidence potentially rebutting recent fabrication) might – or might not – regard as sufficient to impugn the complainant's credibility to the point of deciding not to believe her on the allegations relating to the charges as opposed to on collateral matters.

[107] The evidence that should not have been admitted here is of a different order than the other items relied on by S.B. to impugn the complainant's credibility because, if improperly used, it had the potential to fuel the twin myths that the specific rules in the *Criminal Code* were designed to guard against. The words of Cardozo J. in *Sheppard v. United States*, 290 U.S. 96 (1933), cited in *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, to the effect that "the reverberating clang of those accusatory words would drown all weaker sounds," are relevant here.

[108] It may be said that we can take some comfort in this case from the fact that the trial judge did give the jury a limiting instructing with respect to the proper use of the sexual history evidence. Despite the existence of a number of studies that juries are often not in fact able to follow instructions, juries are presumed to follow the instructions they are given: *R. v. Corbett*, [1998] 1 S.C.R. 670; *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42. The case law does recognize, however, that there may be circumstances where no corrective instruction can cure the prejudice occasioned when inadmissible evidence is placed before a jury. See, e.g. *R. v. Rollocks* (1994), 19 O.R. (3d) 448 (C.A.) at 452; *R. v. Mullings*, 2014 ONCA 895 at paragraphs 88-89; *R. v. Parsons* (1996), 146 Nfld. & P.E.I.R. 210 (NFCA), paragraph 42; *Griffin*, paragraph 108, especially where the evidence is relevant to a marginal or tangential issue whereas the prejudice flowing therefrom goes to a core issue at trial.

[109] In determining whether an admissibility error by a trial judge could have had a material bearing on the acquittal within the *Graveline* test, the presence of a proper jury instruction designed to limit the prejudice occasioned by its admission is not determinative. It is only one factor to consider. See *R. v. Bourgeois*, [1937] 4 DLR 553 at paragraph 21; *R. v. Bleta*, [1964] 1 O.R. 485 (CA). In *Laird*, the Ontario Court of Appeal emphasized that in applying the test, other factors such as the nature of the legal error and the overall strength of the Crown's case were also relevant considerations.

[110] As well, in the current case, there is an additional complication. Not only should certain evidence not have been admitted but other evidence (relating to rebutting recent fabrication) was wrongly excluded. The issue of the curative effect of a proper jury instruction does not touch this issue at all.

[111] The fact is that we do not know what, specifically, might have tipped the scales in the jury's minds towards acquittal. It may have been: (i) all of

the inconsistencies and half-truths, as well as the implications of the text messages and video, taken together; or (ii) it may have been the inconsistencies and half-truths, absent the texts and sex video that may have done it; or (iii) it may have been only the text messages and video alone. If it was (i) or (iii), then without the text messages and video the verdict might well have been different. To conclude that the verdict would necessarily have been the same depends on assumptions that they were only influenced by the evidence other than the text messages and video and would not have used the evidence rebutting recent fabrication to rehabilitate the complainant's evidence. These are assumptions that cannot be made without this Court drawing its own conclusions about the strength and significance of this evidence. This is something I am reluctant in the circumstances to do.

[112] On a proper evidentiary platform, it cannot be said that either the jury at trial or a hypothetical reasonable jury would necessarily have reached the same verdict or would necessarily have reached the opposite conclusion. It can be said, however, that either the actual jury or a hypothetical reasonable jury *might well* have reached the opposite conclusion. In this case, that justifies a new trial.

[113] While the foregoing discussion is most pertinent to the charges of sexual assault, I reach the same conclusion that a new trial is warranted in respect of the other charges as well. This is because the credibility of the complainant appears to have been central to the verdicts on all charges. Absent the jury's being exposed to the impugned evidence and assuming the jury's entitlement to consider the recent fabrication rebuttal evidence, the jury might well have reached the opposite conclusion on the physical assault and firearms charges as well.

[114] For the foregoing reasons, I would set aside the acquittal and order a new trial on all charges.

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J. D. Green C.J.N.L.